72-1719

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Supreme Court of the United States

October Term, 1972.

WILLIAM J. BENDER,

Petitioner,

against

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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In The

SUPREME COURT OF THE UNITED STATES
October Term,
1973

NO. - 528-71

WILLIAM J. BENDER,

Petitioner,

-v-

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Plaintiff prays that a writ of certiorari issue to review the order and judgment of the United States Court of Claims entered in the above entitled case on March 6, 1973, and the order denying plaintiff's motion for rehearing entered in said case on May 8, 1973.

Opinions Below

The opinion of the United States Court of Claims is not reported, and is set forth in the Appendix, infra, at pp. A 3-5. The opinion of the same Court on plaintiff's petition for rehearing is unreported, and is set forth in the Appendix, infra, at pp. A 6-8.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i). The order of the United States Court of Claims granting summary judgment in favor of the defendant and against plaintiff was entered on March 6, 1973.

(ii). Plaintiff's petition for rehearing of the cross-motions for summary judgment was denied by order

entered May 11, 1973.

(iii). The jurisdiction of this Court is conferred by 28 USC 1255 (1).

QUESTIONS INVOLVED

1. In a litigation where plaintiff mounts a threshhold attack upon the nullity of an administrative order absolutely void on its face for want of jurisdiction, did the Court of Claims abandon its function by finally disposing of the litigation without meeting or resolving the jurisdictional issue therein raised and fairly presented?

2. If it is never too late to impeach a judgment or order absolutely void on its face for want of jurisdiction to render it, is it competent for the Court of Claims to bar the jurisdictional attack upon the sole ground of laches?

3. Where an administrative order, absolutely void on its face for want of power to make it, is the basis of a judgment of the Court of Claims, is the judgment of the Court of Claims also void?

4. Does the absence of notice and an opportunity to be heard deny to plaintiff his constitutional rights under the Fifth Amendment to the United States Constitution so as to render null and void the administrative order based thereon?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED.

The Fifth Amendment of the United States Constitution provides: "No person shall be ... deprived of life, liberty or property without the due process of law."

Department of the Army Special Regulations, 615-25-55, May 2, 1952, as changed by Change 2, October 6, 1952, and Change 3, November 10, 1953, provides in part as follows: (Full text appears in Appendix 1 hereto):

> "11. When effective: Reduction of enlisted personnel will be effective -

a. When by sentence of Courts Martial. * * *
b. When by operation of law. * * *
c. In all other cases. - On the date upon which notice of reduction is received by the enlisted person, or, if absent for their own convenience, or through their own fault, upon the date the notice of reduction is received at their proper station."

STATEMENT OF THE CASE

This is a soldier's pay case. Plaintiff was twice administratively reduced in rank and grade upon the alleged ground of inefficiency pursuant to Department of the Army Special Regulation 615-25-55. In pertinent part his petition in the Court below (pars. 5 and 24) alleged:

"5. In connection with his aforesaid administrative reduction in grade and rank:

a. (Withdrawn on motion).
b. He was not given notice and an opportunity to be heard in connection with any charge relating to his conduct or efficiency in the performance of his duties as a soldier, or in relation to any other charge against him.
c. No Court Martial or Non-Judicial Hearing was ever had in relation to his conduct or efficiency as a soldier, or in connection with any other charge against him, or in connection with his reduction.
d. He was never served with or given, nor did he ever receive a copy of any complaint or charge against him, or of any order, or special order relating to his conduct or efficiency as a soldier or otherwise, or relating to his administrative reduction in rank and grade, although he was neither absent

through his own fault, or for his own convenience from his command, and was, at all times, present and available for service upon him of a copy of any such charge or complaint against him, or order or special order in relation thereto.

e. He was administratively reduced in rank by Special Order No. 11 of January 14, 1954, effective retroactively to the preceding January 13, 1954.

f. (Withdrawn on motion).

g. There are no entries in his service record reflecting to his discredit. Entries in his service record relating to his conduct during his term of service are uniformly characterized as "Excellent" (except as to those entries marked "Unknown") from the commencement of his term of service to the date of honorable discharge; and those entries therein relating to his efficiency are characterized (except where stated as "Unknown"), as

"Satisfactory", "Superior", and "Excellent" for his entire term of service in the Army to the date of his honorable discharge therefrom.

h. (Withdrawn on motion).

i. There is in his service record no basis for the reduction. There exists no basis in fact, or ascertainable reason in any way connected with his military service, or his conduct or efficiency in relation thereto upon which such reduction in grade and rank may be founded."

"24. He was deprived of pay, rank and advancement, and subjected to forfeiture of property and rights to which he was entitled by law without due process of law, and in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States."

Plaintiff was twice retroactively reduced. The petition alleges the first reduction in paragraph 5 (e) as

as above related. Defendant's answer to the petition admits the order to be retroactive. The second reduction (raised on the plaintiff's motion for summary judgment) by Special Order of 15 March 1954, was retroactive to 1 March, 1954.

Plaintiff, having exhausted his administrative remedies,* brought suit in the Court of Claims, and there made a collateral attack upon the reduction

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* Administratively, on plaintiff's application to the Army Board for the Correction of Military Records, he requested in writing (on a form provided for such purpose), and was denied the opportunity to appear and be heard on his own behalf. On petition for rehearing before the Administrative Board, he, for a second time, requested the opportunity to appear and be heard, pointing out that his previous written request had been denied. His second request was likewise denied.

orders as void for lack of jurisdiction in that the administrative agency had no power to make a retroactive order. Plaintiff moved for summary judgment upon the ground (among others) that the reduction order was void. Defendant cross-moved for summary judgment. The Court denied plaintiff's motion and granted defendant's cross-motion for summary judgment upon the sole ground of laches in the application.

Upon rehearing, plaintiff pressed a single ground, namely, that the reduction order was absolutely void on its face for lack of jurisdiction; that laches do not apply to a void order; that it may be collaterally attacked at any time and at any place where it is relied upon, and that no other question

was before the Court below for consideration until it first came to gripe with the jurisdictional question.

On rehearing, the defendant did not in any way contest that proposition, contending only that such proposition applies only to the judgments and orders of "established Courts" and not to administrative orders.

At no time did the defendant, either in its answer to the petition, on the cross-motions for summary judgment, or upon rehearing, ever claim that the administrative agency had power or authority to make a retroactive order.

The nullity of the order was apparent upon mere inspection, as much so as a decree of divorce or of adoption made by a traffic officer or notary public.

The Court below did not at any time address itself to the jurisdictional validity of the orders under attack. It did not meet the issue. It did not resolve it. The question was not even debated. The Court did not say the challenged order was valid. The Court said only that it was too late to attack the order.

It was plaintiff's contention that the threshhold question presented was whether the order colaterally attacked was void, and that if it was void, relief from it must be granted.

But the litigation was laid at rest, and the challenged order left intact without a determination of whether it was a nullity and void in contemplation of law, and therefore of no binding

effect. But that is what courts are for, and failure to make that determination when the issue was squarely presented was an abandonment of its function by the Court below.

Plaintiff now claims, in this Court, that the order of the Court of Claims granting defendant summary judgment upon the basis of a void judgment or order is itself also void.

Jurisdiction of the United States Court of Claims was invoked under 28 USC 1491; United States Statutes at Large (64 Stat 112 et seq.), 50 USC 570 (now Title 10 USC 815 as Amended).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims holds that laches is a bar to an attack upon a judgment or order absolutely void

for want of jurisdiction to render it.

The most careful and painstaking research has failed to disclose a single precedent in any Court, in any jurisdiction, where laches was held as to bar an attack upon a judgment or order void for want of jurisdiction to make it. The decision of the Court below in so holding stands alone, and is unique in that regard.

Once the judgment or order was attacked as void for lack of power to make it, the Court had first to reach the question of jurisdiction to determine whether the order is void because the law is universal that laches do not apply to a void order. It is never too late to impeach a void order. (See Argument, infra).

The Court of Claims in brushing aside the jurisdictional issue which was squarely presented and insistently pressed by plaintiff, has so far departed from the accepted and usual course of judicial proceedings, and has additionally so far sanctioned such a departure by an administrative agency, as to call for this Court's power of supervision.

We say the issue was "brushed aside" because in its opinion below the Court of Claims was silent as to that threshhold jurisdictional issue, especially on rehearing where the single issue presented was whether the order under attack was void for want of power to make it.

Specifically, the decision below is in conflict with the decisions of the Courts of Appeal in the following circuits:

United States v. Sotis, (CA7,1942) 131 Fed 2d 783;
Austin v. Smith, (CA Dist Col,1962) 312 F 2d 537, 343;
National Labor Relations Board v. Pappas & Co., (9 Cir.,1913), 203 F 2d 571;
Wood Bros. Construction Co.,Inc. v Yankton County S.D., et al, (8th cir., 1931),54 F 2d 304;
United States v. Turner, (8th cir. 1931), 47 F2d 86,88;
Mitchell v. Village Creek Drainage District, (8th cir.,1946), 158 F 2d 475;
In re V-I-D, Inc., (7th cir.,1947) 158 F 2d 964;
Fischel v. Kite, (CA Dist. Col., 1939), 101 F 2d 685;
Berry v. Allen, et al, (6th cir., 1969), 411 F 2d 1142, 1146;
Bradley v. St. Louis Terminal Warehouse, (8th cir.,1951), 189 F2d 818, 824;
Commonwealth of Kentucky v. Casualty Co. of Baltimore, (6th cir.,1940), 112 F 2d 352, 356;
Bass v. Hoagland, (5th cir.,1949), 172 F 2d 205, 209;
Clay v. Sun River Mining Co.,(10th cir.,1962), 302 F 2d 599;
Davis v. St. Paul Mercury Indemnity Co., (4th cir.,1961), 294 F 2d 641, 643;
Glover v. Coffing, (CA 7-1946), 158 F2d 964.

The decision below is in direct conflict with the applicable decisions of this Court in the cases of:

Kilburn v. Thompson, (1880), 103 US 168, 198; 26 L.Ed. 377;
Williamson v. Berry, (1850),8 How. 495; 49 US;
Thompson v. Whitman, (1873), 18 Wall. 457; 85 US 457;
Knowles v. The Gas Light & Coke Co., (1873), 19 Wall.58; 86 US 58;
Pennoyer v. Neff, 95 US 714;
Williams v. State of North Carolina, (1945), 325 US 226,229, 65 S.Ct. 1092, 89 L.Ed.1577;
Rose v. Himley, (1808), 4 Cranch 240, 241, 8 US 240, 250 2 L.Ed. 608;
Windsor v. McVeigh, (1876), 93 US 274, 277, 282,

which hold that the jurisdiction of a Court or other tribunal to render a judgment is "always open to inquiry" when the judgment is relied on in any other proceeding.

Finally, the absence of notice and

an opportunity to be heard was a denial of due process of law under the Fifth Amendment of the Federal Constitution which rendered the order founded thereon a nullity "not entitled to respect in any other tribunal," (Windsor v. McVeigh, supra, at pages 277 and 282 of 93 U.S.; Bradley v. St. Louis Terminal Warehouse, supra, at p.824 of 189 F 2d; Bass v. Hoagland, at p.209 of 172 F 2d; and "attackable collaterally."

There can be no doubt that the Court below was unimpressed with an invasion of plaintiff's rights by a first reduction order which was retroactive only for a day, and a second order which was retroactive for only two weeks. Plaintiff, as the record shows first learned

of the reductions nine months after the event when he returned from his overseas tour of duty, and the Court below was persuaded that he should then have pursued his remedies, and accordingly sustained the equitable defense of laches as a bar to the action.

While the record also shows that plaintiff was prevented by acts of government from pursuing his remedy such that there were in fact no laches attributable to plaintiff, it is to be emphasized that the presence or absence of laches has neither significance nor materiality upon a challenge to jurisdiction.

When there is a frontal attack upon the jurisdictional validity of the orders, the equities of the situation are

in no manner germane, as we shall hereafter see, and it was simply not competent for the court below to circumvent the jurisdictional issue to consider how the equities preponderated. Laches could not confer jurisdiction. The validity of the challenged orders depended on the power and authority to make them. If that power was lacking, the clear duty of the court was to declare the orders null and void. The court below failed to exercise its judicial function in that regard.

POINT I

THE DOCTRINE OF LACHES DOES NOT APPLY TO A VOID ORDER.

The beginning point is that the challenged orders are void. SR 615-25-55,

having the force of law (Standard Oil Co. of Cal. v. Johnson, (1942), 316 US 481, 86 L.Ed. 1611, 62 S.Ct. 1168), delimits the power and authority pursuant to which its provisions may be implemented, which is but to say that it confers the jurisdiction under which its provisions are capable of enforcement.

It is not alone that the retroactive reduction orders violated the regulation. The point is that the regulation conferred neither power nor authority to make a retroactive order. Otherwise put, jurisdiction in that regard was lacking. Every act of a court, body or officer beyond its or his jurisdiction is void and a nullity.

A void judgment or order may be ignored as a nullity; it may be collaterally impeached, or it may be vacated at any time, and the doctrines of laches and estoppel do not apply.

These basic principles find application and expression in State and Federal jurisdictions alike, from the earliest times.

In the case of Thayer v. Village of Downers Grove, (1938), 369 Ill. 334, 16 N.E. 2d 717, the Court there expounded the rationale of the principle, as follows:

> "Where the Court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the Court, such judgment or decree is void and may be collaterally impeached

> or set aside on motion after the time for review by appeal has expired. (Citations). It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of laches and estoppel do not apply. Jurisdiction in a particular case is not only the power of the Court to hear and determine it, but also the power to render the particular judgment entered, and every act of the Court beyond its jurisdiction is void. People v. Shurtloff, 355 Ill. 210 189 N.E. 291; People v. Circuit Court of Washington County, 347 Ill. 34, 179 N.E. 441; People v. Sullivan, 284 Ill. 28, 119 N.E. 40; Ex Parte Reed, 100 US 13, 25 L.Ed.538." (Emphasis added)

In Ex Parte Reed, 100 US 13, 25 L.Ed. 538, last above cited, the Supreme Court declared:

> "We do not overlook that there must be jurisdiction to give the judgment rendered as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to

be imprisoned in the penetentiary or to suffer punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void.(Cornett v. Williams, 20 Wall. 226; Windsor v. Mc Veigh, 93 U.S. 274, 7 Waits Citations & Defenses, 181."

ACCORD: Valley v. Northern Fire & Marine Ins. Co. ( ), 254 US 348, 353, 354; 65 L.Ed. 297; 41 S.Ct. 116.

The proposition that a judgment or order, void on its face, (as in this case), may be attacked on that ground, either directly or collaterally, at any time is broadly stated in 49 C.J., S794, §401 as follows:

"On the other hand, a judgment which is absolutely void is entitled to no authority or respect and therefore may be impeached at any time, in any proceeding in which it is sought to be enforced or in which its validity

> is questioned, by anyone with whose rights or interests it conflicts."

As early as almost a century ago, this Court in Kilbourn v. Thompson, (1880), 103 US 168,198; 26 L.Ed. 177, noted that the tendency of the Courts "everywhere" is to the doctrine that:

> "... the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; The Gas-Light & Coke Co.,19 id 58; Pennoyer v. Neff, 95 US 714."

Professor Moore in his treatise on Federal Practice says of void judgments that they are but ".... judicial waste-paper" (Moore's Federal Practice, 2d Ed. 1954), Vol. 1B, 10.407, p. 935.

Similarly, in Freeman on Judgments (5th Ed. 1925), Sec. 322, p.645, the author says that ".... such a judgment has been characterized as a dead limb upon a judicial tree which may be chopped off at any time."

> "The theory underlying the concept of a void judgment is that it is legally ineffective - a legal nullity; and may be vacated by the Court which rendered it at any time. (Citation). Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life.(Many citations). Further, it may, when appropriately called in question, be adjudged void in any collateral proceeding and this collateral attack may be made at any time." (7 Moore's Fed Prac 315) (2d Ed. 1954). (Emphasis added)

In 1 Freeman on Judgments (5th Ed. 1925), sec. 271 (pp 538-539) the author states:

"§271. Laches in Application. Independent of any absolute limitations by statute upon the time within which an application to open or vacate a judgment may be made, it may also be defeated by laches. In the exercise of their discretionary powers courts act upon equitable principles. Whenever, therefore, the case presented is not one in which relief is a matter of right, unexplained delay in the application after knowledge of the facts will always be taken into consideration in harmony with the general equitable doctrine of laches, and may be sufficient to defeat relief even though the statutory period has not elapsed. This principle is applicable to all cases where the judgment is not void, whether the proceedings are founded on statute prescribing a maximum limit or whether based on grounds independent of statute. (Emphasis supplied).

And in Volume 3 of Freeman on Judgments, p. 2492, 2493, the author states:

> "If a judgment is void on its face it may be attacked on this ground either directly or collaterally at any time and in any Court in which it may be relied upon." (Emphasis added)

So also, in Volume 7 of Moore's Federal Practice at page 802:

> "A void judgment, state or federal, may be collaterally attacked;i.e., its nullity and ineffectiveness asserted at any time in any proceeding where the validity of the judgment comes in issue and is appropriately challenged."(Emphasis added)

By the same author in the same volume, at page 805 in a discussion of Rule 60 FRCP vis-a-vis collateral attack:

> "Since the void judgment establishes no binding legal obligations, it should not have any res judicata effect when its validity comes in question in any federal court. We conclude, therefore, that Rule 60(b) is dealing

with direct attacks upon judgments rendered by a federal district court in a civil action, and that it leaves undisturbed the right to make a collateral attack upon the federal judgment in any proceeding wherein the validity of the judgment is appropriately challenged.

Now as to time. Laches of a party will not infuse life into a void judgment. The judgment is a legal nullity and may be collaterally attacked at any time." (Emphasis added).

In Verbeem v. United States, (DC ED, Mich. 1957), 154 F. Supp. 431, 435, the Court remarked:

"A judgment rendered without jurisdiction over the subject matter in question is void and a void judgment may be attacked directly or collaterally at any time. See e.g., Williams v. State of North Carolina, 1945, 325, U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577; Rose v. Himely, 1808, 4 Cranch 241, 8 U.S. 241, 2 L.Ed. 608; 7 Moore's Federal Practice, Par. 60.41 (1), (2d Ed.1954)." (Emphasis added).

And in the cited Supreme Court case of Williams v. State of North Carolina, 325 U.S. 226, Mr. Justice Frankfurter, writing for the Court, at page 229 declared:

> "A judgment in one State is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits - - had jurisdiction, that is, to render the judgment.
>
> It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction ...". It was "too late" more than forty years ago. German Savings Society v. Dorsnitzer, 192 U.S. 125, 128." (Emphasis added).

It is too late in this case too, to deny plaintiff the right collaterally to impeach an order void on its face for lack of jurisdiction.

Both the text writers and the Courts are in agreement that it is "universally conceded" that a judgment void for lack of jurisdiction may be impeached "irrespective of lapse of time." (Moore's Fed. Prac. Vol. 7, ¶228, p.447; Freeman on Judgments, 2d Ed. ¶98).

That the proposition is "universally conceded" finds expression in case law - thus, in the Seventh Circuit, the Court of Appeals in the case of United States v. Sotis, (1942), 131 Fed. 2d 783, at page 787, quoting with approval from Anderson v. Anderson, 291 Ill. App. 421, 428, 11 N.E. 2d 216, 219, said:

> "There can be no question about the rule in Illinois and so far as we are advised it is no different in other jurisdictions. * * * It is universally conceded that a judgment void for want of

> jurisdiction over the person of a defendant may be vacated on motion, irrespective of lapse of time." Freeman on Judgments, (2d Ed.), 198.(Emphasis added).

Consequently, it was needless for the plaintiff to show that any equities preponderated in his behalf because such equities are irrelevant.

In 7 Moore's Federal Practice, page 301, Professor Moore states the proposition as follows:

> "A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, if he establishes that the judgment is void."

Of course, there could be no laches absent a duty to assert rights, and a void order imposes no such duty, Valz v. Sheepshead Bay Bungalow Corp., (1928),

249 N.Y. 122, 132, 133; Vol. 1, Freeman on Judgments, (5th Ed. 1925), §322, pp. 643, 644.

Laches, then, are irrelevant to the attack on the nullity on the orders. Laches was not the question before the Court. The question presented was whether the orders were void. That is the only question, whether the attack is direct or collateral, and is dispositive of the litigation.

In Austin v. Smith, (C A Dist Col, 1962), 312 F 2d, 337, 343, where there was a direct attack on the void judgment under Rule 60(b), FRCP, the Court said:

> "Under subsection (4) above, the only question for the court is whether the judgment is void; if it is, relief from it should be

granted. Similarly, under subsection (5), if the underlying judgment is void, the judgment based upon it is also void. Moreover, the Rule places no time limit on an attack upon a void judgment, nor can such a judgment acquire validity because of laches on the part of him who applies for relief from it." 3 Barron & Holtzoff, Federal Practice and Procedure, §1327 (1958). (Emphasis added).

ACCORD: Gimbel Bros. v. Corcoran, 15 N.J. Misc. 538, 192 A 715, 716,: ("Laches or estoppel are never invoked in support of an invalid proceeding or a void judgment."); Valz v. Sheepshead Bay Bungalow Corp., (1928) 249 N.Y. 122, cert. den. (1928), 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560 ("laches and estoppel do not apply."); Brenner v. Margolies, (1953), (Mun. Ct. App. for District of Columbia), 102 A 2d 300, 302, ("when a judgment is void, principles of estoppel and laches can not be invoked"); Cohen v. Ryan, (NY), 34 AD 2d 789, (No.6): ("Laches does not defeat a motion to vacate a judgment which is a nullity."); Flatbush Auto Dis-

count Corp. v. Reich, (NY) 190 Misc. 817; Sampson v. Ward, 395 Ill. 353, 70 N.E. 2d 324.

Neither could there be any question of degree of nullity of the retroactive orders, since that would relegate the court to a determination of how far, whether one day, two weeks, or two years, an administrative officer may legally relate back under the jurisdiction conferred upon him by the regulation.

The making of such a determination at once raises the question of the power of the court to make it.

In Valz v. Sheepshead Bay Bungalow Corp., (1928) 249 N.Y. 122, 133, the court in that regard said:

> "The statutory notice is the basis of the Court's jurisdiction; the Courts have no power

to hold that a notice not conveyed in a manner permitted by the statute may be equally effective."

POINT II

WANT OF NOTICE AND AN OPPORTUNITY TO BE HEARD IS A DENIAL OF DUE PROCESS RENDERING THE PROCEEDING AND THE ORDERS THEREIN A NULLITY AND VOID.

The proposition here contended for finds the clearest possible expression in this Court's holding in Windsor v. McVeigh, (1876), 93 U.S. 274, at page 277 where the Court declared:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all

> nations. A sentence of a Court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any way to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter."

Again, in Bradley v. St. Louis Terminal Warehouse Co., (CA-8, 1951), 189 F 2d 818, 824:

> "A judgment obtained without due process is a nullity and may be attacked directly or collaterally by parties or strangers."

ACCORD: Bass v. Hoagland, (CA 5, 1949) 172 F2d 205, 209.

POINT III

A JUDGMENT FOUNDED ON A VOID ORDER IS ALSO VOID.

This Court should declare the order and judgment of the Court of Claims to be void because founded upon a void administrative order. (Austin v. Smith, supra, at page 343 of 312 F 2d; Berry v. Allen, (6 cir. 1969), 411 F 2d 1142, 1146.

CONCLUSION

In the face of a threshhold attack upon the jurisdictional validity of the challenged orders it is enough simply to read the decisions below to recognize that the Court of Claims did not resolve the jurisdictional issue and thereby abdicated its judicial function in this case.

Federal courts are created, under the Constitution and by the Congress, to perform a judicial function. All cases and controversies must be disposed of by them in a judicial manner. The subversion of the judicial process presents a federal and constitutional question of substantial character which should be reviewed by this Court.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted,

OTIS MARK WATERS
297 Liberty Street
Newburgh, New York 12550.

Attorney for Plaintiff

A-1
Regulation, SR 615-25-15,
Department of the Army.

Changes to SR 6.5-25-55 now in force; C 2 and C 3; all others have been superded

SR 615-25-55
C 3

ENLISTED PERSONNEL

Reductions

Department of the Army
Washington 25, D.C., 10 November 1953

Changes)
No. 3)

SR 615-25-55, 2 May 1951, is changed as follows:

11. (Superseded) When effective. - Reductions of enlisted personnel will be effective -

a. When by sentence of courts-martial. As ordered executed in the court-martial order. Where a sentence to reduction has been imposed by a summary court, the reduction becomes effective upon being ordered executed by the coavening authority. (See MCM 1951,par.90e).

b. When by operation of law. - A reduction by operation of law under MCM 1951, paragraph 126c, becomes effective on the date of the order of execution or upon the final approval and suspension of a sentence. The words "upon being finally approved" as used in MCM 1951, paragraph 126c, are construed to refer to the affirming action that completes all required review.

c. In all other cases. - On the date upon which notice of reduction is received by the enlisted person, or, if absent for his own convenience or through his own fault, upon the date the notice of reduction is received at his proper station.
((AG 220.26 (13 Oct 53)AGRO)

By Order of the Secretary of the Army

M.B. RIDGWAY,
General, United States Army,
Chief of Staff.

OFFICIAL:
WM. E. BERGIN,
Major General, United States Army
The Adjutant General.

A-3

Opinion and Order of the United States Court of Claims dated March 6, 1973 on cross motions for summary judgment.

IN THE UNITED STATES COURT OF CLAIMS

No. 528-71

WILLIAM J. BENDER

v.

THE UNITED STATES

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the Court having been submitted on plaintiff's motion, filed August 28, 1972, and defendant's cross-motion, filed September 27, 1972, for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, without oral argument

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of counsel, it is concluded that plaintiff knew of his reduction in rank by August 13, 1954, but his suit was not filed until July 8, 1971, and therefore that his alleged claim is barred under the doctrine of laches. See Gersten v. United States, 176 Ct.Cl. 633, 364 F 2d 850 (1966); Grisham v. United States, 183 Ct. Cl. 657, 392 F 2d 980 (1968); and, Cason v. United States, 198 Ct. Cl. 650, 461 F.2d 784 (1972). It is further concluded that the defendant is not estopped from pleading laches. See Montilla v. United States, 198 Ct. Cl. 48, 457 F 2d 978 (1972).

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment be and the same is denied, defendant's

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cross-motion for summary judgment is granted and plaintiff's petition is dismissed.

BY THE COURT

Wilson Cowan

CHIEF JUDGE.

MAR-6 1973

Order of the United States Court of Claims on rehearing dated May 11, 1973.

IN THE UNITED STATES COURT OF CLAIMS

358-69 DONALD S. WEIR, Jr.	)	v. THE UNITED STATES
213-70 ROBERT SIMMONS CONSTRUCTION CO.,INC.	)	
444-70 ROLAND DORL	)	
528-71 WILLIAM J.BENDER	)	
847-71 DAVID H. BARAL	)	

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These cases come before the court on motions for reconsideration, rehearing, new trial, to strike affidavit and for further relief under Rules 151 and 152 of the rules of this court, and, on con-

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sideration thereof,

IT IS ORDERED this 11th day of May, 1973, that said motions be and the same are denied as follows:

358-69 Donald S. Weir, Jr. Plaintiff's motion for reconsideration and rehearing.

213-70 Robert Simmons Construction Co.,Inc. Plaintiff's motion for rehearing and/or for new trial. Defendant's motion to strike affidavit of Robert F. Simmons submitted in support of plaintiff's motion for rehearing and/or new trial is denied as moot.

444-70 Roland Dorl. Plaintiff's motion for reconsideration of the court's decision of February 16, 1973.

528-71 William J. Bender. Plaintiff's motion for rehearing of plaintiff's and defendant's cross-motions for summary judgment pursuant to Rule 151.

Order of the United States Court of Claims on rehearing dated May 11, 1973.

847-71 David H. Baral. Plaintiff's motion for reconsideration.

BY THE COURT

Wilson Cowen

Chief Judge.